

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMAL DAMON HENDRIX,

Plaintiff,

Case No. 3:15-cv-00155-MMD-WGC

v.

STATE OF NEVADA, et al.,

Defendants.

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendants' Partial Motion for Summary Judgment. (ECF No. 33; exhibits at ECF Nos. 33-1 to 33-8; joinders at ECF Nos. 49, 58, 62.) Plaintiff did not file a response.

After a thorough review, it is recommended that the motion be denied.

I. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Pl.'s Am. Compl., ECF No. 13.) The events giving rise to this action took place while Plaintiff was housed at Ely State Prison (ESP). (*Id.*) Defendants are: Dr. Romeo Aranas, Jayson Artinger, Renee Baker, Harold Bryne, Jesse Cox, Vance Crowder, Michael Fletcher, Sheryl Foster, Angela Gregerson, Robert Huston, Dawn Jones, Timothy Jones, Steven Kimbrell, Dr. Michael Koehn, Keli Lyons, Jeanette Ornelas, Curtis Rigney, Isaac Winsor, Dean Pinkham, Darlene Varady, and Brian Williams. (ECF Nos. 17, 28, 31, 45, 47, 56, 60, 63.) Doris Parenteau (erroneously sued as D. Bradford) and Leah Bothe were dismissed without prejudice as they were not timely served. (ECF No. 56.) Dean Pinkham was served on November 18, 2016 (ECF No. 45); however, the Attorney

1 General's Office has not filed a notice of acceptance of service on his behalf, and Pinkham has
 2 not filed an answer or other responsive pleading. Within ten days of the date of this Report and
 3 Recommendation, the Attorney General's Office shall advise the court whether it is accepting
 4 service on behalf of Pinkham.

5 On screening, Plaintiff was allowed to proceed with various claims in Counts I-V and
 6 VII-XI of the amended complaint. (See ECF No. 17.)

7 Defendants move for partial summary judgment, arguing that Plaintiff failed to exhaust
 8 his administrative remedies with respect to the free exercise and RLUIPA claims in Count II, as
 9 well as all of Counts V and VIII. (ECF No. 33.)

10 **II. LEGAL STANDARD**

11 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought
 12 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a
 13 prisoner confined in any jail, prison, or other correctional facility until such administrative
 14 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his
 15 administrative remedies irrespective of the forms of relief sought and offered through
 16 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

17 The failure to exhaust administrative remedies is "an affirmative defense the defendant
 18 must plead and prove." *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v.*
Bock, 549 U.S. 199, 204, 216 (2007), *cert. denied*, 135 S.Ct. 403 (Oct. 20, 2014)). Unless the
 19 failure to exhaust is clear from the face of the complaint, the defense must be raised in a motion
 20 for summary judgment. *See id.* (*overruling in part Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th
 21 Cir. 2003) which stated that failure to exhaust should be raised in an "unenumerated Rule 12(b)
 22 motion").

23 As such: "If undisputed evidence viewed in the light most favorable to the prisoner
 24 shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If
 25 material facts are disputed, summary judgment should be denied, and the district judge rather
 26 than a jury should determine the facts [in a preliminary proceeding]." *Id.*, 1168, 1170-71
 (citations omitted). "Exhaustion should be decided, if feasible, before reaching the merits of a

1 prisoner's claim. If discovery is appropriate, the district court may in its discretion limit
 2 discovery to evidence concerning exhaustion, leaving until later—if it becomes
 3 necessary—discovery related to the merits of the suit." *Id.* at 1170 (citing *Pavey v. Conley*, 544
 4 F.3d 739, 742 (7th Cir. 2008)). If there are disputed factual questions, they "should be decided at
 5 the very beginning of the litigation." *Id.* at 1171.

6 Once a defendant shows that the plaintiff did not exhaust available administrative
 7 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is
 8 something in his particular case that made the existing and generally available administrative
 9 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d
 10 767, 778 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate
 11 plaintiff did not meet his burden when he failed to identify any actions prison staff took that
 12 impeded his ability to exhaust his administrative remedies, or otherwise explain why he failed to
 13 comply with the administrative remedies process). The ultimate burden of proof, however,
 14 remains with the defendant. *Id.*

15 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely
 16 or otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion."
 17 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the
 18 agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Id.*
 19 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).
 20 Thus, "[s]ection 1997e(a) requires an inmate not only to pursue every available step of the prison
 21 grievance process but also to adhere to the 'critical procedural rules' of that process. *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir. 2016) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)).
 22 "[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper
 23 exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). That being said, an inmate exhausts
 24 available administrative remedies "under the PLRA despite failing to comply with a procedural
 25 rule if prison officials ignore the procedural problem and render a decision on the merits of the
 26 grievance at each available step of the administrative process." *Reyes*, 810 F.3d at 658.

1 To reiterate, an inmate need only exhaust “available” administrative remedies. *See Ross*
 2 *v. Blake*, 136 S.Ct.1850, 1858 (2016). “Accordingly, an inmate is required to exhaust those, but
 3 only those, grievance procedures that are ‘capable of use’ to obtain “some relief for the action
 4 complained of.” *Id.* at 1859 (quoting *Booth*, 532 U.S. at 738).

5 If the court concludes that administrative remedies have not been properly exhausted, the
 6 unexhausted claim(s) should be dismissed without prejudice. *Wyatt*, 315 F.3d at 1120, *overruled*
 7 *on other grounds by Albino*, 747 F.3d 1162.

8 “If the district judge holds that the prisoner has exhausted available administrative
 9 remedies, that administrative remedies are not available, or that a prisoner’s failure to exhaust
 10 available remedies should be excused, the case may proceed to the merits.” *Albino*, 747 F.3d at
 11 1171.

12 III. DISCUSSION

13 NDOC’s Administrative Regulation (AR) sets forth the grievance procedures in
 14 Nevada’s prisons. (ECF No. 33-1.) An inmate must try to informally resolve the dispute and then
 15 proceed through the informal, first and second levels of the grievance process before a claim will
 16 be considered exhausted. (*Id.*)

17 **A. Free Exercise and RLUIPA Claims in Count II**

18 Insofar as these claims are concerned, Plaintiff alleges that he noticed that his kosher
 19 food tray he received before going to the recreation yard had been thrown in the toilet by Ornelas
 20 and Kimbrell. (ECF No. 13 at 19.) He requested a second kosher food tray from Artinger and
 21 when it arrived, Artinger told Plaintiff over the intercom to look out his cell window, which he
 22 did, and saw Artinger put his hands down in his genital area, remove the contents of the kosher
 23 tray, and then place them back on the tray. (*Id.* at 19-20.) Artinger then ordered Kimbrell to
 24 bring Plaintiff the food tray. (*Id.* at 20.) Plaintiff notified Timothy Jones, the area sergeant, and
 25 asked for another kosher food tray which was denied by Jones “because you’re a raghead
 26 Muslim and I hate you pieces of shits.” (*Id.*) He left his food slot open to get the attention of the
 area lieutenant and asked to speak to Robert Huston. (*Id.*) He informed Huston that his fasting
 for the holy month had been interrupted by Jones, Kimbrell, Artinger, and Ornelas. (*Id.*) Huston

closed Plaintiff's food slot and told Plaintiff: "Fuck your religious holy month, you ain't getting no kosher tray from me." (*Id.*) When Huston left the unit, he told Artinger not to feed Plaintiff anything. (*Id.* at 21.)

On screening, the court determined that Plaintiff stated colorable claims under the First Amendment's Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) based on these allegations. (ECF No. 17 at 10-11.)

At the informal level of grievance 2006-29-75953, Plaintiff asserted that on March 8, 2014, he was "*denied [his] religious common fare lunch tray* by various NDOC prison officials here at [ESP]," including Artinger, Kimbrell, Jones and Huston. (ECF No. 33-3 at 7-9, emphasis added.) When he asked for his food tray they stated that he would get it when he stopped writing inmate grievances on correctional staff. (*Id.*) He stated that this form of retaliation was prohibited. In response he was advised that this was the same day "CERT" was called to manage his disruptive behavior in the recreation area, and indicates that he did not provide evidence of his allegations of not receiving his food. (ECF No. 33-3 at 6.) Plaintiff proceeded to the first level, again stating he was refused his meal by the officers. (*Id.* at 5.) The first level grievance was denied, stating he had not provided evidence that the officers refused his meal. (*Id.* at 4.) Plaintiff then filed a second level grievance. (*Id.* at 2.) The second level grievance was denied, stating that the allegations that custody staff denied his common fare meal were unfounded, and that instead he refused his meal. (*Id.* at 3.)

Defendants argue: "Nowhere in these grievances does Plaintiff allege that he received a common fare meal for lunch before his recreation yard time and that his lunch had been thrown in the toilet by Ornelas and Kimbrell during a cell search." (ECF No. 33 at 5:8-10.) They contend that the allegations of the amended complaint are "substantially" different than the grievance; therefore, he did not exhaust his administrative remedies with respect to his free exercise and RLUIPA claims. (*Id.* at 5.)

A grievance is sufficient "if it alerts the prison to the nature of the wrong for which redress is sought." *Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010) (quoting *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009)). The grievance "need not include legal

1 terminology or legal theories" as its "primary purpose ... is to alert the prison to a problem and
 2 facilitate its resolution, not to lay groundwork for litigation." *Griffin*, 557 F.3d at 1120.

3 While Plaintiff does not include the specific details about the timing of receipt of the
 4 meal and it being thrown in the toilet, Plaintiff sufficiently put prison officials on notice that
 5 correctional officers had denied him his religious common fare meal. Therefore, it is
 6 recommended that Defendants' motion be denied with respect to the free exercise and RLUIPA
 7 claims in Count II.

8 **B. Count V**

9 In Count V, Plaintiff alleges that on April 6, 2014, Jesse Cox destroyed an amended civil
 10 rights complaint which was headed to federal court in retaliation for Plaintiff filing an earlier
 11 grievance against Cox, and stated: "Now, file a grievance on that." (ECF No. 13 at 32.) The
 12 federal district court denied the amended complaint as untimely. (*Id.*) Plaintiff was allowed to
 13 proceed on screening with retaliation and access to courts claims against Cox. (ECF No. 17 at
 14 15.)

15 In grievance 2006-29-77572, Plaintiff states that on April 6, 2014, Correctional Officer
 16 Pickering returned his legal envelope back to him which was going to the U.S. Marshal's Office
 17 to serve the defendants in a civil rights matter because Correctional Officer Cox said that
 18 Plaintiff had to give him his [pink] copy along with it. (ECF No. 33-4 at 7-8.) Plaintiff told Cox
 19 to return the legal envelope so he could place postage stamps on it and so it could go out via
 20 postal service instead of via brass slip because correctional officers had already lost his legal
 21 envelope. (*Id.* at 8.) Plaintiff told Cox several times to send back his legal envelope so he could
 22 put stamps on it and get it to the Marshal's Office. Cox responded on the speaker: "you won't be
 23 getting this one out to them either, so good night." (*Id.*) He said this hindered his access to the
 24 courts and getting the envelope to the Marshal's Office because he feared it would be tampered
 25 with in retaliation for filing grievances. (*Id.* at 9.) In response, Plaintiff was advised that he did
 26 not provide any evidence of his allegations of interference with his legal mail. (*Id.* at 6.)

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1 He filed a first level grievance stating that Pickering conspired with Cox for his
2 complaint to not reach the U.S. Marshal's Office because it had not been returned to him. (*Id.* at
3 5.) In response he was told that NDOC and ESP are not responsible for mail lost by the U.S. Post
4 Office, and brass slips can be tracked so mail should be sent via brass slip. (*Id.* at 4.)

5 He proceeded with filing a second level grievance, stating that he had been retaliated
6 against. (*Id.* at 2.) In response, he was advised that he did not prove his mail had not reached its
7 proper destination or that he mailed an envelope at all. (*Id.* at 3.)

8 In grievance 2006-29-77573, he stated that after Cox took his legal envelope which was
9 being sent to the U.S. Marshal for service, he refused to issue the pink copy receipt from his
10 brass slip sent with the legal envelope so he could show the judge he mailed it. (ECF No. 33-5 at
11 6-7.) He said Cox has done this several times. (*Id.* at 7.) In response he was told that there was
12 no evidence that the legal mail did not make it to its destination. (*Id.* at 5.) Plaintiff filed a first
13 level grievance disagreeing with the informal level response. (*Id.* at 4.) The response states that
14 Cox cited the brass slip process in accordance with the operational procedure, and found
15 Plaintiff's allegations unfounded. (*Id.* at 3.) He then filed a second level grievance stating that he
16 still had not received his civil rights complaint back from the U.S. Marshal's Office or the brass
17 slip. (*Id.* at 2.)

18 Defendants argue that nowhere in these grievances did Plaintiff allege that Cox destroyed
19 his civil rights complaint in front of him or that Cox said: "Now file a grievance on that."
20 (ECF No. 33 at 5.) Because of the difference in the allegations of the amended complaint and the
21 grievance, Defendants contend Plaintiff did not exhaust his administrative remedies.

22 The court reiterates that the grievance need only put prison officials on notice of "nature
23 of the wrong for which redress is sought." *Sapp*, 623 F.3d at 824. Plaintiff stated in his grievance
24 that he asked Cox for the legal envelope back several times and Cox told him "you won't be
25 getting this one out to them either, so good night." (*Id.*) Plaintiff said this hindered his access to
26 the courts and getting the envelope to the Marshal's Office because he feared it would be
tampered with in retaliation for filing grievances. Plaintiff also specifically stated he had been
retaliated against in this instance, and that he had not received his envelope back from Cox. The

1 court finds that these grievances sufficiently put prison officials on notice of the retaliation and
2 access to courts claims asserted in Count V.

3 Therefore, it is recommended that Defendants' motion be denied with respect to
4 Count V.

5 **C. Count VIII**

6 Plaintiff alleges that on June 25, 2014, Baker, Fletcher, and Byrne ordered Dr. Koehn to
7 have Plaintiff removed from the disciplinary housing unit and placed in the facility's infirmary
8 unit in retaliation for a civil rights lawsuit filed against Fletcher. (ECF No. 13 at 41.) Rigney and
9 Pinkham aggressively grabbed Plaintiff from his cell and walked him to the infirmary room on
10 orders from Fletcher. (*Id.*) Fletcher was angry with Plaintiff for turning down a settlement offer
11 in one of his lawsuits. (*Id.*) Plaintiff was told by Rigney and Pinkham he would like his new cell
12 for "having Fletcher in court." (*Id.*) The cell was stained with feces and smelled of urine. (*Id.*)
13 Rigney and Pinkham ordered him to lie on the floor of the cell on his stomach, and Plaintiff
14 refused to do so; however, Rigney and Pinkham then slammed him to the floor and left him
15 without clothing or property. (*Id.*) He filed grievances about the incident which were denied by
16 Bothe, Baker and Foster. (*Id.* at 42-43.)

17 On screening, Plaintiff was allowed to proceed with a retaliation claim against Fletcher,
18 Rigney and Pinkham. (ECF No. 17 at 20.) He was also allowed to proceed with an Eighth
19 Amendment conditions of confinement claim against Rigney and Pinkham, and against Bothe,
20 Baker and Foster on a supervisory liability basis. (*Id.*)

21 In the informal level of grievance 2006-29-83348, Plaintiff stated that on June 25, 2014,
22 Dr. Koehn authorized officers to remove him from his housing unit and placed him in the
23 infirmary for allegedly not taking seizure medication, but this was actually done in retaliation for
24 a pending civil lawsuit against the State of Nevada. (ECF No. 33-6 at 8-9.) He asserts that Dr.
25 Koehn was authorized to put him in the infirmary by Baker and Fletcher, who is a defendant in a
26 pending lawsuit, as well as Byrne. (*Id.* at 9.) He also states that this happened just days prior to
an inmate early mediation conference. (*Id.*) His grievance was denied, stating he was admitted to
the infirmary for non-compliance with seizure medication. (*Id.* at 7.)

1 He filed a first level grievance, stating he was sent to the infirmary in retaliation for
2 initiating a lawsuit against the State of Nevada. (*Id.* at 4.) The first level grievance was also
3 denied stating that he was admitted for medication non-compliance. (*Id.* at 5.) His second level
4 grievance also asserted that he was retaliated for filing grievances and a lawsuit, and it was
5 denied. (*Id.* at 2-3.)

6 Defendants argue that in grievance 2006-29-83348, Plaintiff alleged that Dr. Koehn, as
7 opposed to Baker, Fletcher and Byrne, transferred him to the infirmary in retaliation for a
8 pending lawsuit, and that this grievance alleges secondary supervisory liability against Baker and
9 Fletcher for authorizing the transfer (ECF No. 33 at 6.) They contend that it is substantially
10 different from the allegations of the amended complaint and does not serve to exhaust
11 administrative remedies. (*Id.*)

12 A grievance is sufficient “if it alerts the prison to the nature of the wrong for which
13 redress is sought,” *Sapp*, 623 F.3d at 824, and need not “provide personal notice to a particular
14 official that he may be sued,” *Jones*, 549 U.S. at 219. Grievance 2006-29-83348 sufficiently put
15 prison officials on notice of Plaintiff’s claim that he was put in the infirmary cell in retaliation
16 for initiating a lawsuit/filing grievances. Defendants’ motion should be denied insofar as the
17 retaliation claim in Count VIII is concerned.

18 In grievance, 2006-29-84335, the second level grievance states that he was left in the
19 infirmary in a feces-covered cell with no out of cell exercise, on a bed with no guard rails.
20 (ECF No. 33-7 at 2, 4.)

21 Defendants acknowledge that grievance 2006-29-84335 claimed the infirmary cell was
22 covered in feces, but argue that in the second level grievance Plaintiff accused Dr. Koehn and
23 not Rigney and Pinkham for these alleged conditions. (ECF No. 33 at 7.)

24 Again, this grievance sufficiently put prison officials on notice of the conditions of his
25 Plaintiff’s infirmary cell. He was not required to correctly name each of the prison officials
26 involved, as the purpose of the grievance is to alert prison officials to the problem to allow them
to attempt a resolution, and not to put a particular prison official notice of potential future
litigation.

1 Defendants' motion for summary judgment should be denied as to Count VIII.
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3 **IV. RECOMMENDATION**

4 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order
5 **DENYING** Defendants' Partial Motion for Summary Judgment (ECF No. 33).

6 The parties should be aware of the following:
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8 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
9 this Report and Recommendation within fourteen days of receipt. These objections should be
10 titled "Objections to Magistrate Judge's Report and Recommendation" and should be
11 accompanied by points and authorities for consideration by the district judge.

12 2. That this Report and Recommendation is not an appealable order and that any notice of
13 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
14 until entry of judgment by the district court.

15 DATED: March 23, 2017.

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17 WILLIAM G. COBB
18 UNITED STATES MAGISTRATE JUDGE
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